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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FACEBOOK, INC., a Delaware corporation,
Plaintiff/Counterclaim Defendant,

v.

BRANDTOTAL LTD., an Israeli corporation, and UNIMANIA, INC., a Delaware corporation,
Defendants/ Counterclaim Plaintiffs.

Case No. 3:20-CV-07182-JCS

PLAINTIFF FACEBOOK INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS THE DEFENDANTS' SECOND AMENDED COUNTERCLAIMS PURSUANT TO FED. R. CIV. P. 12(B)(6)

Hon. Joseph C. Spero
Courtroom F – 15th Floor
Date: August 27, 2021
Time: 9:30 a.m.

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Facebook's motion established that BrandTotal failed to cure the defects in its UCL counterclaim that had caused the Court to dismiss it twice before. Rather than confront those defects, BrandTotal repeats arguments already rejected by this Court. Its opposition confirms that, even after multiple opportunities to plead its best claim and specific guidance from the Court on what would be needed for it to do so, BrandTotal cannot state a viable UCL claim. This Court should dismiss the UCL claim with prejudice.

First, BrandTotal incorrectly argues that it need not establish a violation of the antitrust laws themselves to adequately maintain an unfair prong claim. The Court previously rejected this argument, explaining that a competitor can avoid the requirements of antitrust law only in "unusual" cases implicating a legislatively-defined policy. BrandTotal does not identify any such policy.

Second, BrandTotal fails to explain how its allegations plausibly define either of the two markets mentioned in the SAC. BrandTotal now contends that one of the markets—for Third-Party Commercial Advertising Information on personal social networking services—is really a "submarket," and that the other market—for Third-Party Commercial Advertising Information on the Facebook.com and Instagram platforms—is something that it calls a "derivative market." But BrandTotal never explains how these buzzwords excuse BrandTotal's failure to plausibly allege the basic elements of a relevant market. Indeed, its contradictory allegations render both markets implausible—one of the very problems that led this Court to dismiss this claim the last time around.

Third, BrandTotal fails to plausibly plead that Facebook holds monopoly power in the markets that it purports to define. Instead, it relies exclusively on a single conclusory allegation that Facebook controls 95% of a different market—for all social media in the United States. But the SAC nowhere defines any social media market; BrandTotal's own allegations contradict that Facebook has such a high market share; and common sense compels the conclusion that Facebook cannot possibly have a 95% market share in a market that includes YouTube, LinkedIn, and Amazon.

Finally, despite its denials, BrandTotal's UCL claim relies on a refusal to deal theory. And yet, it fails to establish the only exception to the Ninth Circuit's general no-duty-to-deal rule. BrandTotal does not plead any joint, cooperative venture of the type that courts have required, has not plausibly alleged that the only conceivable rationale for the alleged conduct was to exclude competition, and

has not adequately alleged that the relevant products are available to similarly situated customers.

Because BrandTotal still cannot allege a UCL claim, it should be dismissed with prejudice.[1]

I. ARGUMENT

BrandTotal relies on four primary arguments to salvage its UCL claim. All fail.

A. BrandTotal Cannot Avoid The Antitrust Laws

BrandTotal again argues that it can state a plausible claim under the UCL's unfair prong even if it has not pleaded a violation of the antitrust laws. Opp. 8-10; Second MTD Order at 24. But "an 'unfair' claim by a competitor under the UCL generally must implicate the antitrust laws," except in "other circumstances" that are "limited to claims by consumers rather than competitors." Second MTD Order at 24-25 & n.14. This case does not present those "other circumstances," nor does BrandTotal allege them. To state a claim based on those "other circumstances," BrandTotal would have to allege an "unusual aspect of the alleged conduct that would make that conduct something that violates the 'policy and spirit' of the antitrust laws without violating the actual laws themselves." *Creative Mobile Techs., LLC v. Flywheel Software, Inc*., 2017 WL 679496, at *6 (N.D. Cal. Feb. 21, 2017). It does not.

The holding in *Diva Limousine, Ltd. v. Uber Techs., Inc.*, 392 F. Supp. 3d 1074 (N.D. Cal. 2019), upon which BrandTotal relies, is not to the contrary. *See* Opp. 9-10. This Court already considered and rejected the holding of *Diva Limousine* as inapplicable because, unlike the claimants in that case, BrandTotal points to "no comparable recognition by the California courts or legislature that Facebook's conduct here impairs competition." First MTD Order at 17. Nothing has changed. While BrandTotal waves its hands at Facebook's "legal obligations under the FTC Order," Opp. 9, it does not cite any "legislatively declared policy" to which Facebook's alleged misconduct can be "tethered," *Diva Limousine*, 392 F. Supp. 3d at 1091. A bargained-for consent agreement with an executive agency is not a legislatively declared policy. *See, e.g.*, *Wolf v. Pac. Nat'l Bank*, 2010 WL 5888778, at *5 (S.D. Fla. Dec. 28, 2010) (holding that a "consent order is not a statute or ordinance" because an "executive agency" is "not a legislative body"). Moreover, BrandTotal's argument that Facebook's "practice of flatly refusing" all requests to automatically collect data, Opp. 9-10, is a

[1] BrandTotal admits that its claim under the "unlawful" prong of the UCL premised on defamation rises and falls with its defamation claim. *See* Opp. 17.

rejection of its obligations under the FTC Order is merely a dressed-up refusal-to-deal theory, which fails for the reasons discussed *infra*.[2] *See infra* pp.8-10. BrandTotal's argument is nothing more than an improper request for reconsideration of this Court's previous holding, and it should be rejected.

B. BrandTotal Still Fails To Plausibly Allege A Relevant Market

Nothing in the opposition changes the fact that the SAC does not plausibly allege a relevant market. As Facebook explained (Mot. 9-10), the SAC contains none of the ingredients necessary to plausibly allege BrandTotal's first proposed market—for Third-Party Commercial Advertising Information On Personal Social Networking Services. And as Facebook also explained (Mot. 10), BrandTotal cannot fill that gap by invoking markets proposed by the FTC and HJC because those markets have different boundaries and are for different products. Confronted with these problems, BrandTotal contends that it has actually alleged a "submarket" of the FTC and HJC markets, but that (mis)label cannot make those very different markets relevant to this case.

BrandTotal similarly errs in attempting to justify its alternative "market" for information from Facebook's platforms. Trying to evade the general rule against such single-brand markets (Mot. 11), BrandTotal labels this a "derivative market." But this Facebook-only "market" has none of the features that could even conceivably make it a derivative market. BrandTotal's failure to plausibly allege any relevant market requires dismissal. *Newcal Indus., Inc. v. IKON Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008) (Rule 12(b)(6) dismissal appropriate when "the alleged market suffers a fatal legal defect").

1. Third-Party Commercial Advertising Information On Personal Social Networking Services In The United States

As Facebook explained in its motion (at 9-10), the SAC contains no factual allegations that would support its market definition of "Third-Party Commercial Advertising Information on personal social networking services in the United States" and thus completely omits the basic ingredients of a legally-sufficient relevant market. *See, e.g.*, *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1998) (complaint must plausibly exclude alternatives that consumers could substitute for the same purpose ("reasonable interchangeability") and allege sufficient facts to establish consumer switching

[2] BrandTotal does not actually claim that Facebook is violating the FTC Order, but even if it had so claimed, that order can be enforced only by the FTC.

in response to price increases ("cross-elasticity of demand")). The opposition offers no persuasive response. BrandTotal asserts that its alleged market has "unique customers and specialized vendors," Opp. 11, but it identifies no *factual allegations* in the SAC about these customers or vendors. Beyond these unsupported assertions, BrandTotal points only to conclusory allegations that there are "no viable alternative[s]" to Facebook's social media platforms and "no economic substitutes" for access to this information. *See* Opp. 11 (quoting SAC ¶ 166); *see Newcal*, 513 F.3d at 1045 (holding that the presence or absence of viable alternatives and economic substitutes is the legal test for market definition.). But BrandTotal cannot avoid dismissal just by conclusorily alleging that the operative legal test is satisfied. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[O]n a motion to dismiss, courts are not bound to accept as true a legal conclusion couched as a factual allegation.").

Rather than offering any factual development of its own, BrandTotal tries to piggyback off the HJC's and the FTC's attempts to define markets. As Facebook explained (Mot. 10), however, those purported markets are completely different from BrandTotal's alleged market. BrandTotal's only response is to claim that its alleged market is actually a "submarket" of the "market for personal social networking." Opp. 11. The SAC never claimed that this market was a "submarket" and BrandTotal cannot fill in its pleading gaps through argument in its opposition brief. *See, e.g.*, *Flaa v. Hollywood Foreign Press Ass'n*, 2020 WL 8256191, at *7 (C.D. Cal. Nov. 20, 2020) (rejecting attempt to recharacterize proposed relevant market as a submarket because "it is axiomatic that the complaint may not be amended by briefs in opposition to a motion to dismiss"). But in any event, BrandTotal's submarket argument makes no sense: what BrandTotal describes is not a submarket of "personal social networking," but a completely different market for a completely different product with completely different consumers. *See, e.g.*, Opp. 11 (contending that the alleged submarket has "unique customers"). "[A] 'submarket' that is not even a smaller grouping within the main market is nonsense." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 533b at n.4 (4th and 5th eds., 2021 Cum. Supp.). As alleged, in the "personal social networking" market, the consumers are users of a personal social networking service, *see* FTC Complaint ¶ 52, whereas in the proposed Third-Party Commercial Advertising Information market, advertisers are the consumers of information about advertising. And, if either market is broader, it is

the supposed market for Third-Party Commercial Advertising, not the market for personal social networking. As explained (Mot. 11-12), the HJC and FTC both attempt to exclude YouTube, LinkedIn, and Amazon from the personal social networking market, whereas the SAC expressly alleges that BrandTotal scrapes advertising data from these specific "social media sites." *See* SAC ¶ 44. This Court previously dismissed BrandTotal's complaint based, in part, on this very "inconsisten[cy]," Second MTD Order at 26-27, yet BrandTotal still fails to address it.[3]

Further, in attempting to craft a market for information about a sliver of online advertising, BrandTotal ignores the clear guidance of both the Ninth Circuit and this Court that "many courts have rejected [on motions to dismiss] antitrust claims reliant on proposed advertising markets [including submarkets] limited to a single form of advertising." *Hicks*, 897 F.3d at 1123; Second MTD Order at 27 (same); *see also* Mot. 10-11. This Court has previously identified this precise problem. *See* Second MTD Order at 27. Yet, as with so many other defects, BrandTotal again fails to explain why it should be allowed to arbitrarily gerrymander a market that is "not natural, artificial, and contorted to meet [its] litigation needs." *Hicks*, 897 F.3d at 1121 (internal quotation marks omitted).

2. Third-Party Commercial Advertising Information On The Facebook.com And Instagram Platforms

As Facebook explained (Mot. 11), BrandTotal's other market—Third Party Commercial

[3] At times, BrandTotal appears to equate the market for "social media" with the market for "personal social networking." *E.g.*, SAC ¶ 166. To the extent this is intentional, that would render BrandTotal's reliance on the FTC's and HJC's purported market definitions all the more incomprehensible because the FTC and HJC go to great lengths to distinguish those supposed markets in a (failed) attempt to define a market so unnaturally narrow that they can try to argue that Facebook possesses monopoly power. *See* Complaint, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590, ECF No. 3 at ¶ 59 ("FTC Complaint") (D.D.C. Dec. 9, 2020) ("Personal social networking is distinct from … services primarily for the passive consumption and posting of specific media content."); Staff of S. Comm. on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, 116th Cong., Report and Recommendations on the Investigation of Competition in Digital Markets ("House Judiciary Report") at 88 ("Social Networks are Distinguishable from Social Media"). And even then, the HJC still excludes Amazon from its broader social media market. *See* House Judiciary Report at 15 (alleging that "Amazon has significant and durable market power in the U.S. online retail market"). Moreover, the notion that Facebook controls 95% of any social media market that includes YouTube, Amazon, Twitter, and LinkedIn—which, at times, appears to be BrandTotal's contention—so defies common sense and real-world experience as to render any such market definition implausible. *E.g.*, *Hicks v. PGA Tour*, 897 F.3d 1109, 1121 (9th Cir. 2018) (courts should use "common sense" in evaluating market definition on motion to dismiss); *see also infra* pp.7-8.

Advertising Information on the Facebook.com and Instagram Platforms—is a single-brand market nearly identical to the one this Court already rejected. This Court has already held that "single-brand markets are, at a minimum, extremely rare." Second MTD Order at 27. In general, a company's "own products do not themselves comprise a relevant market" and, accordingly, a company does not violate the antitrust laws "by virtue of the natural monopoly it holds over its own product." *Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008). Moreover, here again, BrandTotal's single-brand market is "inconsistent," *see* Second MTD Order 27, with BrandTotal's own allegation that it offers "competitive analyses of advertising efforts on social media sites like Facebook, Instagram, Twitter, YouTube, LinkedIn, Amazon, and others," SAC ¶ 44—an allegation that, as this Court explained, "tends to suggest a larger market," Second MTD Order 27.

BrandTotal's only response is to argue that it is actually alleging a "derivative market." Opp. 12; *see also* Mot. 11 n.3 (noting that single-brand markets have only been recognized in derivative aftermarkets). Again, the SAC does not allege a derivative market and BrandTotal cannot fill its pleading gaps through argument in its opposition brief. *See Flaa*, 2020 WL 8256191, at *7. But even if it could, BrandTotal never explains how its alleged market is a derivative market at all. A valid single-brand derivative market "follows a particular model: First, a consumer purchases a particular brand of a good or service. Second, the nature of that good or service requires the *same* consumer to purchase a follow-on good or service in a derivative aftermarket." *In re ATM Fee Antitrust Litig.*, 2010 WL 2557519, at *7 (N.D. Cal. June 21, 2010). For example, derivative aftermarkets might exist in situations like in *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451 (1992) (cited at Opp. 12), in which the Supreme Court found a fact issue as to whether "single-brand aftermarkets—markets for parts and service for Kodak equipment—arose once customers have purchased and are 'locked in' to Kodak photocopiers or equipment." *Psystar Corp.*, 586 F. Supp. 2d at 1197. Facebook's platforms are a poor fit for this framework because users of those products do not pay for their use—the services are free and so there is no lock in. But that issue aside, users of these platforms are not required to purchase "Third-Party Commercial Advertising Information" in any follow-on market. Indeed, BrandTotal's only attempt to fit its allegations into this paradigm is an incomplete sentence that is missing any reasoning. *See* Opp. 12 ("Third-Party Commercial Advertising on Facebook is not interchangeable

with Third-Party Commercial Advertising Information on other sites (e.g., YouTube, Twitter, etc.) because …"). Especially in light of BrandTotal's own allegations, it has not provided and cannot provide any basis for this Court to depart from the ordinary rule against single-brand markets.

C. BrandTotal Still Fails To Plausibly Allege Monopoly Power

The opposition's short discussion of monopoly power is, if anything, even more deficient than its discussion of the SAC's market definition. BrandTotal incorrectly asserts that it has adequately alleged monopoly power based on a single unsupported—indeed, unsupportable—allegation that Facebook has "control of 95% of *all social media in the United States*." Opp. 13 (citing SAC ¶ 157) (emphasis added). Despite BrandTotal's protestations, this bald assertion suffers from the same defects that led Judge Boasberg to dismiss the FTC's antitrust claims against Facebook because the FTC had failed "to plead enough facts to plausibly establish … that Facebook has monopoly power in the market." *FTC v. Facebook, Inc.*, 2021 WL 2643627, at *1, 11 (D.D.C. June 28, 2021). As in that case, BrandTotal fails to explain what the alleged share refers to, let alone how it could be calculated. *See id.* at *2, *12-13; *accord Korea Kumho Petrochemical v. Flexsys Am. LP*, 2008 WL 686834, at *9 (N.D. Cal. Mar. 11, 2008) (plaintiff "must assert some *facts* in support of its assertions of market power that suggest those assertions are plausible."). Worse, BrandTotal's "only market share allegation does not establish [Facebook's] market share in the actual market[] defined by the Complaint." *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, 2013 WL 3242245, at *14 (N.D. Cal. June 25, 2013). BrandTotal's 95%-figure purports to measure Facebook's share of the user-side market of "social media in the United States," not its share of the entirely different advertiser-side market of Third-Party Commercial Advertising Information on personal social networking services in which BrandTotal supposedly competes. SAC ¶ 158. As Judge Boasberg held, allegations about share in one market are not probative of power in a different market. *See FTC*, 2021 WL 2643627, at *13; *accord Rheumatology Diagnostics Lab*, 2013 WL 3242245, at *14.[4]

[4] BrandTotal is wrong that it can distinguish *FTC* on the ground that its single allegation about market share rests on a "Congressional report and Facebook's own claims"—both of which trace back to two alleged "internal [Facebook] documents" described on page 138 of the HJC report. Opp. 13. These 2012 documents are almost a decade old and measure monthly minutes of use as compared to "all other social media." *Id.* at 13-14. At most, this discussion of the *user*- and not *advertiser*-side of any supposed market is irrelevant, especially in light of the other defects in BrandTotal's allegations.

Moreover, BrandTotal's assertion that Facebook controls 95% of a "social media" market is facially implausible given BrandTotal's other allegations and common sense. Although the opposition points only to this 95%-figure, the SAC also bases its theory of monopoly power on the fact that the FTC "currently maintains a lawsuit against Facebook that alleges Facebook holds monopoly power in the market of personal social networking services in the United States." SAC ¶ 156. The complaint in that case contains an entirely different market share allegation ("in excess of 60%"), *FTC*, 2021 WL 2643627, at *12, an allegation that the district court rejected as insufficient, and the SAC and opposition never even attempt to reconcile these substantially different measures. Nor does BrandTotal ever explain how Facebook could plausibly control 95% of a market that includes large companies like YouTube, LinkedIn and Amazon—a critical question given BrandTotal's own allegation that it offers "competitive analyses of advertising efforts" on these "social media sites." *See* SAC ¶ 44. These internal contradictions are fatal to BrandTotal's assertion of monopoly power.

D. BrandTotal Still Fails To Allege An Exception To The Right To Refuse To Deal

BrandTotal likewise fails to satisfy (or avoid) the "one, limited exception to [the] general rule that there is no antitrust duty to deal," *FTC v. Qualcomm Inc.*, 969 F.3d 974, 993 (9th Cir. 2020), once again largely repackaging arguments that this Court has already rejected. BrandTotal argues that the SAC presents two different UCL theories—one based on Facebook notifying Google about BrandTotal and one based on Facebook disabling BrandTotal's Facebook user accounts and revoking access to Facebook, including to advertise. *See* Opp. 14. But these are not actually distinct UCL theories; they are just two actions that Facebook took to achieve what BrandTotal claims is a single anticompetitive objective: restricting access to Third Party Commercial Advertising Information from Facebook's platforms. *See* SAC ¶ 163, 171.

However framed, this is a refusal-to-deal theory, because BrandTotal seeks to force Facebook to conduct business with potential rivals. Indeed, that is what this Court already held when BrandTotal made the materially identical argument that this is "not a refusal-to-deal case" because Facebook "has ***interfere[d]*** with rather than merely refused to aid BrandTotal's efforts to collect advertising data." Second MTD Order at 27 (emphasis added). As this Court explained, "so long as Facebook generally has a right to set rules for accessing the password-protected portions of its website—a principle not

reasonably in dispute—its refusal to authorize the access BrandTotal seeks is a refusal to deal with a potential competitor." *Id.* To avoid dismissal, BrandTotal must establish how its allegations fit into an exception to the right to refuse to deal. It has not—and cannot.

Further, BrandTotal's theory concerns not just a refusal to deal but a refusal to deal in *Third-Party Commercial Advertising Information*. That is the market that BrandTotal attempts to define and the market in which BrandTotal claims Facebook harmed competition. Accordingly, BrandTotal must show that Facebook's restriction of *Third-Party Commercial Advertising Information* fits into the "three key features" of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Second MTD Order at 28. On this threshold requirement, BrandTotal falls short. It does not even attempt to show that Facebook voluntarily and profitably transacted to provide BrandTotal Third-Party Commercial Advertising Information, that the only conceivable rationale for terminating BrandTotal's scraping was sacrifice of short-term benefits to exclude competition, and that Facebook withholds data from competitors that is otherwise available to non-competitors. *See also* Mot. 15-17.

Instead, BrandTotal tries to fit Facebook's restricting of BrandTotal's *accounts* and *advertising* into the *Aspen Skiing* framework. But BrandTotal does not explain how this conduct alone—divorced from its impact on BrandTotal's access to Third-Party Commercial Advertising Information—could possibly be anticompetitive. BrandTotal does not define any market in advertising *purchases* or user *accounts*; it does not allege that Facebook had monopoly power in any such markets; and it does not explain how Facebook's blocking of BrandTotal harmed *competition*, as opposed to a *competitor*, in either of those unalleged markets. *See* First MTD Order at 16-17 ("BrandTotal has not alleged any injury to *competition*, as opposed to injury to BrandTotal alone.").

In any event, even (erroneously) focusing just on the enforcement actions Facebook took against BrandTotal's accounts—including its advertising accounts—BrandTotal's claims would still fail. For instance, BrandTotal has not alleged the requisite "profitable course of dealing" between competitors (the first *Aspen Skiing* factor). In *Aspen Skiing*, as in the very few other cases to recognize a duty to deal, the plaintiff and defendant put forward a *joint* offering. 472 U.S. at 587-95. Here, the SAC contains no allegations of "an agreement or an 'implicit understanding' between" BrandTotal and Facebook to cooperate in any way. *hiQ Labs, Inc. v. LinkedIn Corp.*, 485 F. Supp. 3d 1137, 1151

(N.D. Cal. 2020). At most, BrandTotal alleges business dealings between Facebook and BrandTotal, *see* SAC ¶ 169 (Facebook enjoyed "a mutually beneficial and profitable course of dealing" because it "received approximately $125,000 from Defendants to advertise on Facebook")—not the kind of joint, cooperative venture that is an essential predicate for *Aspen Skiing*'s applicability.

Likewise, the SAC does not come close to pleading that the *only* conceivable rationale for suspending BrandTotal's accounts and advertising was anticompetitive (the second *Aspen Skiing* factor). Indeed, nothing in the SAC or BrandTotal's opposition plausibly suggests that Facebook's decision to terminate BrandTotal's accounts was "irrational but for its tendency to harm competition." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1076 (10th Cir. 2013). Instead, the SAC makes plain another equally conceivable rationale—that Facebook wanted to protect its platform and prevent BrandTotal from violating Facebook's Terms of Service. *See* Mot. 15-16. While the SAC says this was not the actual basis for Facebook's actions, it fails to offer any factual allegations supporting the conclusion—as the law requires—that Facebook's rationale was not even "conceivable." *Qualcomm*, 969 F.3d at 993. And while BrandTotal contends that this issue cannot be resolved at this stage of the litigation, *see* Opp. 15-16, courts—including this Court—do not hesitate to reject refusal-to-deal arguments on a motion to dismiss. *See, e.g.*, Second MTD Order at 27-28; *FTC*, 2021 WL 2643627, at *17; *Reveal Chat Holdco, LLC v. Facebook, Inc.*, 471 F. Supp. 3d 981, 1000-03 (N.D. Cal. 2020); *hiQ*, 485 F. Supp. 3d at 1149-51; *see also LiveUniverse, Inc. v. MySpace Inc.*, 304 F. App'x 554, 555-57 (9th Cir. 2008) (affirming Rule 12(b)(6) dismissal of refusal-to-deal claim).

Finally, BrandTotal fails to adequately allege that Facebook provides the supposedly relevant products—advertising services and pages on Facebook's platform—to "similarly situated customers" (the third *Aspen Skiing* factor). *See* Second MTD Order at 28. Facebook's Terms (cited at SAC ¶ 25) prohibit collection of data using automated means and provide that Facebook can "remove or restrict access to content that is in violation of these provisions." BrandTotal alleges no facts showing that Facebook offers advertising services and pages to non-competitors who are *similarly situated to BrandTotal*—i.e., entities that Facebook has caught scraping data in violation of Facebook's Terms.

II. CONCLUSION

The Court should dismiss ***with prejudice*** BrandTotal's UCL counterclaim.

Dated: August 4, 2021

WILMER CUTLER PICKERING HALE AND DORR LLP

By: */s/ Sonal Mehta*
Sonal N. Mehta

Attorney for Plaintiff Facebook, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2021, I electronically filed the above document with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered counsel.

Dated: August 4, 2021

By: */s/ Sonal N. Mehta*
Sonal N. Mehta